

**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6072

DATE COMPLAINTS FILED: September 15,  
2008

DATE OF NOTIFICATIONS: September 22,  
2008 and October 7, 2008

LAST RESPONSE RECEIVED: October 24, 2008

DATE ACTIVATED: December 17, 2008

EXPIRATION OF STATUTE OF LIMITATIONS:  
October 3, 2013/October 21, 2013

COMPLAINANT:

David R. Browning

RESPONDENTS:

Northland Regional Chamber of Commerce  
Saint Joseph Area Chamber of Commerce  
NPG Newspapers, Inc.  
Missouri Western State University

RELEVANT STATUTES  
AND REGULATIONS:

2 U.C.S. § 431(8)(A)  
2 U.S.C. §§ 431(9)(A) and (B)  
2 U.S.C. § 441b(a)  
11 C.F.R. § 100.92  
11 C.F.R. § 100.154  
11 C.F.R. § 110.13  
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

**I. INTRODUCTION**

This matter involves three October 2008 candidate debates in which the participants invited to attend were the individuals who had won the Democratic and Republican nominations in Missouri's August 5, 2008, primary election for the U.S. House of Representatives in the State's 6<sup>th</sup> Congressional District. The Saint Joseph Area Chamber of Commerce ("St. Joseph")

1 scheduled a debate for October 3, 2008, Missouri Western State University ("Missouri Western")  
2 and the NPG Newspapers, Inc. ("NPG") planned to co-sponsor a debate on October 16, 2008,  
3 and the Northland Regional Chamber of Commerce ("Northland") scheduled its debate for  
4 October 21, 2008.

5 Prior to the scheduled debates, complainant, who had won the Libertarian Party's primary  
6 election for Missouri's 6<sup>th</sup> Congressional District and who was qualified to appear on the general  
7 election ballot, alleged in complaints filed with the Commission that each of the four prospective  
8 debate sponsors had improperly denied him the opportunity to participate in the debates by  
9 failing to use pre-established, objective criteria, and by promoting certain candidates over others,  
10 in violation of the Commission's debate staging regulations at 11 C.F.R. § 110.13.<sup>1</sup>

11 As discussed in more detail below, Northland and St. Joseph, non-profit, tax-exempt  
12 corporations organized under 26 U.S.C. § 501(c)(6), did not technically qualify as "debate  
13 staging" organizations. Specifically, these organizations failed to qualify as "debate staging"  
14 organizations due to their tax status, as the Commission's debate regulations at 11 C.F.R.  
15 § 110.13 apply only to nonprofit organizations described in 26 U.S.C. §§ 501(c)(3) or (c)(4).  
16 Given Northland's and St. Joseph's adherence to the substantive aspects of the regulations,  
17 however, we recommend that the Commission exercise its prosecutorial discretion and dismiss  
18 the complaint as to them. This Office further recommends that the Commission find no reason  
19 to believe that either NPG, which is a qualified debate staging entity under 11 C.F.R.  
20 § 110.13(a)(2), or Missouri Western, which withdrew from co-sponsoring the October 16, 2008,

---

<sup>1</sup> Complainant's committee's FEC disclosure reports show that he neither raised nor spent more than \$5,000, and therefore, he did not meet the definition of "federal candidate" at 2 U.S.C. § 431(2)(A). However, in a similar matter, the Commission proceeded with an analysis of the complaint, responses and the applicable regulations, where the complainant, although qualified to be on the state ballot, did not register with the Commission as a federal candidate. See MUR 5650 (University of Arizona).

10044272616

1 debate, violated the Federal Election Campaign Act, as amended ("the Act"), or the  
2 Commission's regulations.

3 **II. DISCUSSION**

4 **A. Northland and St. Joseph**

5 The Act prohibits "any corporation whatever" from making contributions or expenditures  
6 in connection with federal elections. 2 U.S.C. § 441b(a). However, 2 U.S.C. § 431(9)(B)(ii)  
7 exempts from the definition of "expenditure" "nonpartisan activity designed to encourage  
8 individuals to vote or register to vote," which has been construed to exclude "funds provided to  
9 defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R.  
10 §§ 110.13 and 114.4(f)" from the definition of "contribution" and "expenditure," respectively.  
11 See 11 C.F.R. §§ 100.92 and 100.154. Section 110.13(a)(1), in turn, permits "[n]onprofit  
12 organizations described in 26 U.S.C. §§ 501(c)(3) or (c)(4) and which do not endorse, support, or  
13 oppose political candidates or political parties" to "stage candidate debates in accordance with  
14 this section and 11 C.F.R. § 114.4(f).<sup>2</sup> The regulations leave the structure of the debate to the  
15 discretion of the staging organization, provided that the debate includes at least two candidates,  
16 the organization does not arrange the debates in a manner that promotes or advances one  
17 candidate over another, and the criteria for candidate selection are objective and pre-established,  
18 under 11 C.F.R. §§ 110.13(b) and (c).<sup>3</sup>

19 In prior Commission matters, we pointed out that measuring the objectivity of the  
20 selection criteria does "not require rigid definitions or required percentages." See MURs 4956,

---

<sup>2</sup> Section 114.4(f) allows qualified candidate debate staging organizations to use their own funds to stage debates, and to accept funds from corporations for that purpose.

<sup>3</sup> In its *Explanation and Justification for Corporate and Labor Activity* at 60 Fed. Reg. 64260 (December 14, 1995), the Commission stated that section 110.13 does not require that candidate selection criteria be reduced to writing or be made available to all candidates. *Id.* at 64262.

10044272617

1 4962 and 4963 (Gore 2000 *et al.*), First General Counsel's Report at 19. "Objective' does not  
2 mean that the candidate selection criteria must be stripped of all subjectivity or be judged only in  
3 terms of tangible, arithmetical cut-offs. Rather, it appears they must be free of 'content bias,'  
4 and not geared to the 'selection of certain pre-chosen participants.'" *Id.* at 23. *Cf. Arkansas*  
5 *Educational Television v. Forbes*, 523 U.S. 666, 683 (1998) (in a case involving a First  
6 Amendment challenge to state-owned television network's decision on a candidate's exclusion  
7 from a televised debate, the Supreme Court observed that "objectivity" is based on a "reasonable,  
8 viewpoint neutral exercise of journalistic discretion"). In past "debate" MURs, the Commission  
9 has considered a number of different criteria to have been acceptably "objective," including  
10 percentage of votes by a candidate received in a previous election; the level of campaign activity  
11 by the candidate; his or her fundraising ability and/or standing in the polls; and eligibility for  
12 ballot access. *See* MURs 4956, 4962, and 4963 (Gore 2000, *et al.*); MUR 5395 (Dow Jones, *et*  
13 *al.*); and MUR 5650 (University of Arizona).

14 Northland states in its response that it decided to choose the two candidates who received  
15 the largest number of votes in the August 5, 2008, primary to participate in its October 21, 2008,  
16 debate. Northland Response at 1. The Missouri Secretary of State's August 2008 Primary  
17 Results attached to the response show that the Republican and Democratic candidates who  
18 participated in Northland's debate received 36,131 and 36,712 votes, respectively, another  
19 Democratic candidate received 6,714 votes, and the complainant received 225 votes. According  
20 to Northland, its selection process did not involve any consideration of the candidate's  
21 viewpoints or their respective political parties. Northland Response at 1-2. Attached to its  
22 Response is an affidavit by Northland's Chairman, Ellen Todd, who avers that a subcommittee of  
23 Northland established the criterion—the two candidates who received the largest vote totals in

10044272618

1 the August primary—in the spring of 2008 and informed media outlets of the criterion in May of  
2 2008. She further avers that neither of the two debate participants were promoted or advanced  
3 over the other. Although complainant stated that his allegations against Northland were  
4 supported by “written statements,” these written statements, September 2008 e-mails filed as an  
5 attachment to Northland's response, merely state that Northland invited the two candidates with  
6 the most votes in the primary.

7 In its response provided prior to its scheduled debate, St. Joseph asserts that its  
8 determination to limit participation to the two winning primary candidates was based on pre-  
9 established objective criteria, not based solely on party affiliation, and the debate was not  
10 structured to promote or advance one candidate over another. Rather, according to St. Joseph,  
11 due to the time constraints of a less-than-one-hour debate, it had determined that only those  
12 candidates with significant public support would be invited to debate. St. Joseph Response at  
13 1-2. It provided a copy with its response of the then-most recent poll conducted by Survey USA  
14 showing that complainant had only a maximum of 6% of the vote in Missouri's 6<sup>th</sup> Congressional  
15 District (in the “other” category). As such, St. Joseph states that it “determined that the objective  
16 factors of public interest do not weigh in favor of inviting the complainant to participate in the  
17 forum.” *Id.* at 2. According to the Survey USA poll, the two debate participants received 48%  
18 and 44% of the vote, respectively. Thus, it appears that both Northland and St. Joseph used pre-  
19 established, objective criteria and did not arrange the debates in a manner that promoted or  
20 advanced one candidate over another, as required by sections 110.13(b) and (c).

21 Both of these corporate entities, however, are tax-exempt business leagues, organized  
22 under section 501(c)(6), rather than under sections 501(c)(3) or (4), as required by the

10044272619

Commission's debate staging regulations. Accordingly, Northland and St. Joseph do not qualify for the safe harbor created by section 110.13(a)(1).

In an analogous situation, the Commission dismissed the matter in an exercise of its prosecutorial discretion. In that matter, MUR 5650 (University of Arizona), a Libertarian candidate filed a complaint with the Commission because he was excluded from a debate sponsored by the University. The University was incorporated, but tax-exempt under 26 U.S.C. § 115 as an "integral part of a government agency," rather than under 26 U.S.C. §§ 501(c)(3) or (c)(4). According to the University, the context of the debate was as follows: "in March 2004, [the Associated Students of the University of Arizona ("ASUA"), a department of the University], decided that its programs for the 2004 Spring and Fall semesters would be united under one theme, coined 'Civic Engagement,'" and that "ASUA's goals included generating as much student interest in its Civic Engagement program as possible." University Response at 3. It asserted that voter registration, education, and voting were the central objectives of the program, and that "[t]he Education component of the Civic Engagement series involved speeches by various political speakers and one debate on campus, which is the debate at issue in this matter." *Id.* The First General Counsel's Report for MUR 5650 stated that, as the University had met all the other criteria for staging debates that would exempt it from section 441b(a) liability, there did not appear to be a good policy reason under the circumstances presented for denying it the benefit of the debate staging regulations based only on its tax status, and therefore recommended that the Commission exercise its prosecutorial discretion and dismiss the matter. MUR 5650 First General Counsel's Report at 7-8.

In extending the debate staging exemption to nonprofit organizations organized under 26 U.S.C. § 501(c)(3) (generally charitable, religious, or educational organizations), the

10044272620

1 Commission noted that such organizations are prohibited by statute from participating in or  
2 intervening in any political campaign on behalf of any candidate for public office. *Explanation*  
3 *and Justification, Funding and Sponsorship of Federal Candidate Debates*, 44 Fed. Reg. 76734  
4 (December 27, 1979). As for extending the exemption to section 501(c)(4) organizations, the  
5 Commission noted that, although such organizations are permitted to participate in a political  
6 campaign to a limited degree, those that choose to do so would not qualify as ones that do not  
7 endorse, support, or oppose political candidates or political parties; thus, they would not be able  
8 to stage debates. *Id.* Section 501(c)(6) organizations (business leagues) include chambers of  
9 commerce, like Northland and St. Joseph, as well as economic development corporations, real  
10 estate boards, trade boards, professional football leagues, and other types of business leagues.  
11 They are characterized by a common business interest, which the organization typically  
12 promotes. Section 501(c)(6) organizations may engage in limited political activities that inform,  
13 educate, and promote their given interest. They may not, however, engage in direct expenditures  
14 advocating a vote for a political candidate or cause.

15 Northland, according to its Response and the accompanying affidavit, states that its  
16 primary mission "is to enhance the business community, economic growth and quality of life in  
17 the Northland," consisting mainly of Missouri's Platte and Clay counties. Northland Response at  
18 1. Likewise, St. Joseph's stated mission is "to create an environment that allows business to  
19 succeed and the community to prosper." See [www.saintjoseph.com](http://www.saintjoseph.com). We have found no  
20 indication that either of these organizations support, oppose, or endorse candidates or political  
21 parties. See 11 CFR § 110.13(a)(1). Northland's Response, and the attached affidavit of Ms.

10044272621

Todd, specifically deny that Northland does so. With respect to St. Joseph, its President states:

Chambers of Commerce don't endorse political candidates or take partisan sides at any level of government. We do, however, pursue business-related issues and disseminate information regarding each candidate's views and platform as they relate to (or impact) the business sector and the local economy.

Available at [www.St.Joseph.com](http://www.St.Joseph.com).

Thus, like the University of Arizona in MUR 5650, it appears that Northland and St. Joseph have met all the substantive criteria for staging debates that would exempt them from section 441b(a) liability, except for the nature of their tax status. Moreover, part of the relief requested by the complainant—"the immediate intervention of the Commission to declare the debate in violation of the rules of the Commission," and to include the complainant "in the aforesaid debates"—is no longer available. Therefore, we conclude there is no good policy reason for proceeding in this particular case. Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the complaints as to the Northland Regional Chamber of Commerce and the St. Joseph Area Chamber of Commerce. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

We did not recommend in MUR 5650 that the Commission admonish the University, and we do not recommend that it caution Northland and St. Joseph here. However, this MUR raises a concern that what appeared to be an isolated situation in MUR 5650 may be more widespread. Therefore, unless and until the Commission changes its debate staging regulations, only nonprofit corporations organized under 26 U.S.C. §§ 501(c)(3) and (4) are eligible to stage debates. Given that, and in an effort to promote voluntary compliance with the Act by these Respondents and other nonprofit organizations, we plan to remind Northland and St. Joseph in

10044272622



1 their closing letters that the Commission's regulation at section 110.13 exempts only nonprofit  
2 corporations organized under 26 U.S.C. §§ 501(c)(3) or (c)(4) that stage debates from 2 U.S.C.  
3 § 441b(a).

4 **B. NPG**

5 The Commission's regulations provide that "[b]roadcasters (including a cable television  
6 operator, programmer, or producer), *bona fide* newspapers, magazines and other periodical  
7 publications may stage candidate debates in accordance with [section 110.13] and 11 C.F.R.  
8 § 114.4(f), provided they are not owned by or controlled by a political party, political committee  
9 or candidate." 11 C.F.R. § 110.13(a)(2). In its Response, NPG states that it operates the  
10 St. Joseph's News Press, a daily newspaper distributed in St. Joseph, Missouri, and is not  
11 controlled by any candidate, political party or political committee. NPG Response at 2.<sup>4</sup> As  
12 such, NPG is covered by section 110.13(a)(2) to the extent that it complied with the rules in  
13 sections 110.113(b) and (c). See MURs 5395 (Dow Jones) and 4956, 5962 and 4963 (Gore  
14 2000).<sup>5</sup>

15 According to NPG's Response, submitted prior to its scheduled debate, it complied with  
16 the Commission's debate staging criteria at 11 C.F.R. §§ 110.13(b) and (c) by including at least  
17 two candidates and not promoting one of them over the other, and by selecting debate

---

<sup>4</sup> NPG is a division of News-Press and Gazette Company, which has holdings in newspapers, cable, and broadcast television stations. <http://npg-inc.com>.

<sup>5</sup> In MURs 4956, 4962 and 4963 (Gore 2000, Inc.), where a candidate was denied access to candidate debates involving incorporated press entities, some of which covered the debates and some of which staged them, the Commission found no reason to believe that any of these entities violated 2 U.S.C. § 441b(a). In a Statement of Reasons, Commissioner Mason took the position that the Commission's inquiry should be restricted to whether the media exemption applies (citations omitted); if it does, he stated that the Commission's inquiry is at an end. Thus, in debate cases involving *bona fide* media entities, according to Commissioner Mason, if the entity is not owned or controlled by a political party or candidate, it is irrelevant whether the media entity covers the debate or stages it. See First General Counsel's Report in MUR 5395 (Dow Jones) (separate analyses for press entities depending on whether entity is covering or staging candidate debates).

10044272623

1 participants based on pre-established, objective criteria. *Id.* at 3. Attached to NPG's Response is  
2 an affidavit by Ken Newton, an employee of NPG, which avers that he selected the two debate  
3 participants based solely on pre-established objective criteria, including an examination of each  
4 candidate's financial support, popular support, historical data, and expenditures of time, money  
5 and effort. Newton Affidavit at 1. Specifically, the Newton Affidavit states that, based on those  
6 factors, complainant raised only \$3,300, while the Democratic and Republic candidates raised in  
7 excess of \$1.8 million, and that election polls reflected that complainant's popular support was  
8 no greater than 4%. In addition, according to Newton, the historical data from general elections  
9 in 2002, 2004, and 2006 reflected that Libertarian candidates had garnered no more than an  
10 average 1.7% of the vote in the District race. *Id.* at 1-2. Newton also notes that neither he nor  
11 NPG received any press releases from complainant's campaign discussing its campaign  
12 positions, but had received press releases from the Democratic and Republican candidates, and  
13 that he was unaware of any public appearances by the complainant in St. Joseph, Missouri, until  
14 September 14, 2008, when complainant spoke at a picnic attended by approximately ten people.  
15 *Id.* at 2. These criteria appear to be acceptably objective. Therefore, we recommend that the  
16 Commission find no reason to believe that NPG Newspapers, Inc. violated the Act or the  
17 Commission's regulations.

18 **C. Missouri Western**

19 In its Response submitted before the scheduled debate, Missouri Western states that it  
20 had initially agreed to co-sponsor the October 16, 2008, debate with NPG, but it withdrew after  
21 being contacted by complainant. Missouri Western Response at 1. Complainant "asserted that  
22 as a candidate of a valid party legally on the ballot, he should be allowed to participate in the  
23 debate." *Id.* After discussions among the University president, his staff, and outside counsel,

10044272624

1 Missouri Western advised NPG that it would not co-sponsor the debate unless all qualified  
2 candidates who were on the ballot were allowed to participate. *Id.* at 1-2. Missouri Western told  
3 NPG it could still use its facilities as the sole sponsor of the debate, provided that NPG pay the  
4 normal rental fee for the space. *Id.* After Missouri Western's outside general counsel advised  
5 the complainant it would not co-sponsor the debate without his participation, complainant orally  
6 stated that he would withdraw his complaint against Missouri Western. *Id.* at 2. Missouri  
7 Western attached to its Response an e-mail dated September 11, 2008, from complainant,  
8 thanking the University for its attention to the problem, and stating "I consider this matter settled  
9 and will withdraw my complaint against the University." Although the complainant has not  
10 formally sought to withdraw his complaint, Missouri Western did not sponsor the debate, which  
11 was the subject of the complaint against it. Accordingly, we recommend that the Commission  
12 find no reason to believe that Missouri Western State University violated the Act or the  
13 Commission's regulations. In addition, we recommend that the Commission close the file as to  
14 all respondents.

15 **III. RECOMMENDATIONS**

- 16 1. Dismiss the allegation as to the Northland Regional Chamber of Commerce.  
17  
18 2. Dismiss the allegation as to the St. Joseph Area Chamber of Commerce.  
19  
20 3. Find no reason to believe that NPG Newspapers, Inc. violated the Federal Election  
21 Campaign Act of 1971, as amended, or the Commission's regulations.  
22  
23 4. Find no reason to believe that Missouri Western State University violated the Federal  
24 Election Campaign Act of 1971, as amended, or the Commission's regulations.  
25  
26 5. Approve the attached Factual and Legal Analyses.  
27  
28 6. Approve the appropriate letters.

10044272625

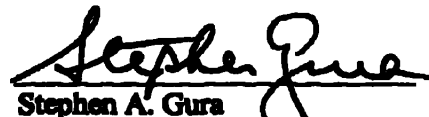
7. Close the file as to all respondents.

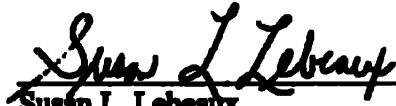
Thomasenia P. Duncan  
General Counsel

Ann Marie Terzaken  
Associate General Counsel  
for Enforcement

3/13/09  
Date

BY:

  
Stephen A. Gura  
Deputy Associate General Counsel

  
Susan L. Lebeaux  
Assistant General Counsel

  
Ruth L. Heilizer  
Attorney